

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNELL HAILES,

Defendant-Appellant.

---

UNPUBLISHED

September 20, 2002

No. 232325

Washtenaw Circuit Court

LC No. 99-013230-FC

Before: Markey, P.J., and Cavanagh and R. P. Griffin\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third degree criminal sexual conduct, MCL 750.520d(1)(b), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 60 to 120 months' imprisonment. We affirm.

Defendant argues on appeal that he was denied the effective assistance of counsel. Because defendant failed to move for a *Ginther*<sup>1</sup> hearing below, this Court's review is limited to errors apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that his counsel's performance fell below an objective standard of reasonableness. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Further, a defendant must establish that, but for defense counsel's errors, there is a reasonable probability that the result of the proceedings would have been different and that the result of the proceedings was fundamentally unfair and unreliable. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

---

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

---

\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

First, defendant claims that his counsel was ineffective for failing to object to the prosecutor's alleged use of the complainant's prior inconsistent statement as substantive evidence in his closing argument. We disagree.

"Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted." *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). In this case, when the remarks are considered in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), the prosecutor was not arguing that the complainant's prior inconsistent statement should be used as substantive evidence. Rather, the prosecutor was arguing that the inconsistency between what the nurse testified the complainant told her and what the complainant actually testified to at trial should not adversely affect the jury's assessment of the complainant's credibility. Because the prosecutor's use of the prior inconsistent statement was proper, any defense objection would have been futile. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Next, defendant argues that his counsel was ineffective for failing to object to the nurse's testimony regarding the complainant's statement about her underwear being removed at the time of vaginal penetration. However, as discussed above, the prosecutor did not use the complainant's statement as substantive evidence; therefore, whether it was admissible such that it could properly be used as substantive evidence is of no matter.

Finally, defendant argues that his counsel was ineffective for failing to request CJI2d 4.5. Although defendant is correct that this jury instruction was applicable in this case, because the complainant's prior inconsistent statement was not used as substantive evidence, defendant has not demonstrated that he was prejudiced by his attorney's failure to request this instruction. In sum, defendant has failed to show that he was denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey  
/s/ Mark J. Cavanagh  
/s/ Robert P. Griffin